

NO. 67257-6-I

COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION I

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COURT OF APPEALS DIV I
STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TOMMY D. HOLLINS,

Appellant.

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

THE HONORABLE MARIANE C. SPEARMAN

BRIEF OF RESPONDENT

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A. ISSUES

1. Appellate courts will not generally consider an issue that was not presented to the trial court. An exception is made for manifest error of constitutional magnitude. Hollins raises a claim under RCW 10.31.100, a statute rooted in the common law. Should this Court decline to reach this wholly statutory claim raised for the first time in this appeal?

2. A police officer may make a warrantless arrest for a gross misdemeanor where the officer has probable cause and the crime is committed in the officer's presence. The officer who observed Hollins's conduct directed his arrest via radio, kept Hollins and the arrest team in constant view, and descended from her viewpoint and confirmed that the right person had been detained. Was the presence requirement of RCW 10.31.100 satisfied here?

3. Under the fellow officer rule, each officer acting as part of a team is deemed to cumulatively possess all of the information known to the members of the team. This rule has regularly been applied to determine probable cause in felony arrests. Here, the officers involved were working as a team, and they shared the facts that supported probable cause among

themselves. Should the fellow officer rule be applied in this gross misdemeanor arrest?

B. STATEMENT OF THE CASE

1. PROCEDURAL FACTS.

Defendant Tommy D. Hollins was charged by information and amended information with Possession with Intent to Manufacture or Deliver Cocaine. The State further alleged that Hollins committed this crime within 1000 feet of a school bus route stop located at Third Avenue and Prefontaine Place in Seattle.

CP 1-4, 12.

A jury found Hollins guilty as charged, including the special allegation based on proximity to a school bus route stop. 4RP¹ 3-4; CP 75-76. Based on Hollins's offender score of 11, the trial court imposed a standard-range sentence of 60 months. 5RP 5; CP 78-86.

¹ The verbatim report of proceedings consists of five volumes, which will be referred to in this brief as follows: 1RP (3-2-11 and 3-3-11); 2RP (3-7-11); 3RP (3-8-11); 4RP (3-9-11); and 5RP (5-12-11).

2. TRIAL TESTIMONY.

On April 19, 2010, Seattle Police Officer Sonya Fry was on the lookout for illegal drug activity in the Pioneer Square area of Seattle. 3RP 31. She had stationed herself on an upper floor of a building, from which she was observing activity on the street with the aid of binoculars. 3RP 31-32.

Fry observed a man whom she later identified as Tommy Hollins exchange something with another man; the second man put the item in his mouth and walked away. 3RP 32-33. Fry suspected that she had observed a drug deal. 3RP 33.

About three minutes later, Hollins made contact with a second man. 3RP 35. The two ducked into an alcove and appeared to exchange something. Id. Fry saw several people who were known to her as regular crack cocaine smokers start to gather around. Id. Fry again suspected a drug deal. Id.

The third and final contact took place at Occidental Park, again within about three minutes. 3RP 39-40. Hollins made contact with a female this time; again, Fry observed a brief exchange. Id.

After the third contact, Fry used her radio to call in the arrest team -- two officers who were waiting nearby, mounted on bicycles.

3RP 7-9, 40. Fry gave the arrest team a description of Hollins, including clothing. 3RP 8, 41. She maintained visual contact with Hollins until the arrest team made contact with him. 3RP 8, 40-41. At that point, she went down to the street. 3RP 41. She confirmed that they had the right person. 3RP 9, 41.

Several pieces of aluminum foil were recovered from Hollins's mouth. 3RP 10, 13-14. Hollins admitted that the foil contained narcotics. 3RP 14-15. Hollins also had \$37 in his pocket. 3RP 15-16. Hollins did not have in his possession a crack pipe or any other smoking paraphernalia. 3RP 16.

Forensic testing confirmed that the foil-wrapped material obtained from Hollins contained cocaine. 2RP 17. The transportation manager for the Seattle Public Schools testified that the three exchanges that Officer Fry observed all took place within 1000 feet of a school bus route stop. 2RP 22, 25-31.

Hollins testified on his own behalf. He said that he was in Pioneer Square looking for drugs -- he hoped to find three rocks of crack cocaine for \$30 and smoke it down by Safeco Field. 3RP 61-62. He planned to use someone else's pipe. 3RP 69-70, 80-81. He succeeded in purchasing three rocks from the woman he

contacted in Occidental Park, and put the three foil-wrapped pieces of crack cocaine in his mouth. 3RP 66-69.

Hollins said that, almost immediately, police officers jumped out of a van and grabbed him by the wrists. 3RP 68, 70. Hollins spit out the drugs and turned them over to the police, who took him to the precinct. 3RP 70-71.

C. ARGUMENT

1. HOLLINS WAIVED ANY CLAIM UNDER RCW 10.31.100 BY FAILING TO RAISE IT IN THE TRIAL COURT; IN ANY EVENT, THE REQUIREMENTS OF THE STATUTE WERE MET IN THIS CASE.

Hollins maintains that he may challenge his arrest under RCW 10.31.100 in this appeal, despite the fact that he never raised such a challenge in the trial court. He then argues that his arrest violated the statute because the crime of drug traffic loitering is a gross misdemeanor, and the crime did not occur "in the presence of" the arresting officer, as required by the statute.

Hollins is wrong on both counts. His attempt to transform this statutory claim into a constitutional one should be rejected. The claim is waived. In any event, the arrest was made "in the presence of" the officer who observed the crime.

a. CrR 3.6 Hearing.

In his trial brief, Hollins requested a CrR 3.6 hearing "to determine that the Defendant's stop, search, seizure and arrest was with probable cause and founded suspicion." CP 14. Hollins also filed a separate "Defense Motion to Suppress Evidence and Memorandum in Support Thereof," which he based explicitly on the Sixth Amendment and Article I, Section 7 of the Washington Constitution. CP 7. Neither document contains any mention of RCW 10.31.100. CP 7-11, 13-19.

At the hearing, the State called only the observation officer, Officer Fry.² Officer Fry testified essentially as she did at trial in describing the three exchanges that she observed. 1RP 19-28. Based on her training, she believed that Hollins's three contacts with people in a high narcotics area were sufficient to support an arrest for drug traffic loitering. 1RP 17, 28.

Officer Fry called in the arrest team. 1RP 28. She gave them a description of what Hollins was wearing, and his direction of travel. Id. She maintained visual contact with Hollins until the

² At trial, the State also called Officer Legaspi, who was part of the arrest team. 3RP 3-27.

arrest team arrived, and she confirmed that they had arrested the correct person. 1RP 28-29.

Hollins chose not to testify at the suppression hearing. 1RP 42. He argued to the court that there could be an innocent explanation for the contacts that Officer Fry observed. 1RP 43-44. He maintained that her observations did not rise to the level of probable cause to arrest him for drug traffic loitering. 1RP 44.

The trial court found that there was probable cause to arrest Hollins for the crime of drug traffic loitering, contrary to Seattle Municipal Code 12A.20.050(B). 1RP 49; CP 23. In its written findings, the court found that Officer Fry "maintained visual contact with the defendant until the arresting officers arrived," and that she "never lost visual contact with defendant during her entire observation period." CP 22-23.

b. Hollins Waived Any Claim Under RCW 10.31.100.

As a general rule, an appellate court will not consider an issue that was not raised in the trial court. State v. McFarland, 127 Wn.2d 322, 332-33, 899 P.2d 1251 (1995) (citing RAP 2.5(a)). An exception is made for manifest error that is of constitutional

magnitude. State v. Kirkman, 159 Wn.2d 918, 934, 155 P.3d 125 (2007) (citing RAP 2.5(a)(3)).

Hollins's argument on appeal is that his arrest for drug traffic loitering, a gross misdemeanor, was "unlawful under RCW 10.31.100, which generally prohibits warrantless arrests for misdemeanors not committing [sic] in the presence of the arresting officer." Brief of Appellant at 1. On its face, this claim is wholly statutory. The statute at issue, RCW 10.31.100, is simply a legislative codification of a common law rule. State v. Ortega, 159 Wn. App. 889, 894-95, 248 P.3d 1062, review granted, 171 Wn.2d 1031 (2011). Such a claim may not be raised for the first time in this appeal. See State v. Hughes, 154 Wn.2d 118, 153, 110 P.3d 192 (2005) (declining to address alleged violation of right of allocation for the first time on appeal, because "the right at issue is statutorily based and is not a constitutional right").

Hollins nevertheless asserts that, because he challenged probable cause for his arrest in the trial court, somehow RCW 10.31.100 was "implicitly implicated." Brief of Appellant at 16. This falls woefully short of transforming a statutory claim based in a

common law requirement into a constitutional claim.³ The Washington Supreme Court "has rejected the argument that all trial errors which implicate a constitutional right are reviewable under RAP 2.5(a)(3)." Kirkman, 159 Wn.2d at 934. "Exceptions to RAP 2.5(a) must be construed narrowly." Id. at 935.

This case presents a classic example of the reasons for adhering strictly to the waiver rule. Because Hollins did not raise a claim under RCW 10.31.100 before the trial court, neither the parties nor the court were focused on the statute's requirement that a gross misdemeanor be committed in the presence of the arresting officer. Thus, at the CrR 3.6 hearing, the State did not ask Officer Fry where she was when she confirmed that the arrest team had arrested the right person, or whether she went down to the street at some point during this process.⁴ 1RP 28-29. Nor did the State call either of the members of the arrest team to clarify Officer Fry's role in Hollins's arrest.

³ Hollins's reliance on State v. Littlefair, 129 Wn. App. 330, 119 P.3d 359 (2005) is unavailing. Littlefair argued that the search of his property was unconstitutional, and the appellate court found a violation of both the Fourth Amendment and Article I, Section 7 of the Washington Constitution. Littlefair, 129 Wn. App. at 339, 344.

⁴ At trial, Officer Fry testified that she "observed [Hollins] being contacted, and at that point then I went down to the street." 3RP 41.

Thus, the degree to which Officer Fry participated in the arrest, a crucial question here, cannot be answered on this record. This Court should decline to address this claim. See McFarland, 127 Wn.2d at 333 (even a constitutional claim is not "manifest," and thus cannot be raised for the first time on appeal, where the facts necessary to adjudicate the claimed error are not in the record).

c Hollins Committed The Crime "In The Presence Of" Officer Fry.

The trial court found that Officer Fry had probable cause to arrest Hollins for the gross misdemeanor of drug traffic loitering, contrary to Seattle Municipal Code ("SMC") 12A.20.050(B), (E).⁵ CP 23. A police officer may make a warrantless arrest for a misdemeanor or gross misdemeanor, based on probable cause, only when the crime is committed "in the presence of the officer." RCW 10.31.100.⁶

This Court recently interpreted the presence requirement in a case with facts remarkably similar to those now before the Court.

⁵ The text of SMC 12A.20.050 is attached to the Brief of Appellant at Appendix B.

⁶ The statute contains numerous exceptions to the presence requirement, none of which applies in this case.

In Ortega, supra, a police officer observing the street from the upper floor of a building saw Ortega engaging in contacts that appeared to be drug transactions, while a companion appeared to act as a lookout. 159 Wn. App. at 892-93. Believing that he had probable cause to arrest Ortega for drug traffic loitering, the officer contacted the arrest team by radio, giving them specific instructions on the location and appearance of Ortega and his companion. Id. at 893. The observing officer maintained visual contact with the suspects up until the time of the arrest, then met with the arrest team and confirmed that they had the correct persons. Id.

This Court found that the presence requirement of RCW 10.31.100 was satisfied under these facts:

The observing officer viewed the conduct, directed the arrest, kept the suspects and officers in view, and proceeded immediately to the location of the arrest to confirm that the arresting officers had stopped the correct suspects. [Officer] McLaughlin's continuous contact rendered him a participant in the arrest. Although McLaughlin was not the officer who actually put his hands on Ortega, McLaughlin was an arresting officer in the sense that he directed the arrest and maintained continuous visual and radio contact with the arrest team.

Ortega, 159 Wn. App. at 898.⁷

⁷ The Washington Supreme Court has accepted review in Ortega. 171 Wn.2d 1031 (2011). The court heard oral argument on March 15, 2012.

Similarly, here, Officer Fry was an arresting officer for purposes of RCW 10.31.100. She viewed Hollins's conduct, directed his arrest, kept Hollins and the arrest team in view, and went down to the street and confirmed that the arrest team had detained the correct person. Thus, even if Hollins did not waive this statutory claim, it should be rejected.

d. This Court Should Apply The Fellow Officer Rule To This Gross Misdemeanor.

Washington courts have long recognized the fellow officer rule. The rule provides that, when police are acting in concert, probable cause may be determined based upon the information possessed by the police as a whole. State v. Maesse, 29 Wn. App. 642, 646-47, 629 P.2d 1349, review denied, 96 Wn.2d 1009 (1981). Thus, an arrest directive made by an officer who possesses probable cause is sufficient to justify arrest by an officer lacking knowledge of the facts supporting probable cause. State v. Alvarado, 56 Wn. App. 454, 456-57, 783 P.2d 1106 (1989), review denied, 114 Wn.2d 1015 (1990). A reviewing court may consider the cumulative information possessed by all officers in a joint

investigation. State v. Bradley, 105 Wn. App. 30, 39, 18 P.3d 602 (2001).

The cases cited above applied the fellow officer rule to felony arrests. Washington courts have indicated some willingness to apply the rule to misdemeanors, however. See Torrey v. City of Tukwila, 76 Wn. App. 32, 882 P.2d 799 (1994) (in federal civil rights action where defendants claimed a violation of RCW 10.31.100, court had "no difficulty" applying fellow officer rule where arrest was for Tukwila Municipal Code "standards of conduct" violations in adult entertainment cabaret). The State urges this Court to apply the rule in this case.⁸

The fellow officer rule supports Hollins's arrest. Officer Fry imparted the facts necessary for probable cause to arrest Hollins to Officer Legaspi, who effected the physical arrest. Because all of the officers involved cumulatively possessed all of the necessary information, the presence requirement of RCW 10.31.100 was satisfied in this case.

⁸ The State recognizes that this Court declined to apply the fellow officer rule to a gross misdemeanor in Ortega, 159 Wn. App. at 898. The State makes this argument here to preserve it in the event that the Supreme Court holds otherwise in that case.

D. CONCLUSION

For all of the foregoing reasons, the State respectfully asks this Court to affirm Hollins's conviction for possession with intent to deliver cocaine.

DATED this 18th day of May, 2012.

Respectfully submitted,

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Certificate of Service by Mail

Today I deposited in the mail of the United States of America, postage prepaid, a properly stamped and addressed envelope directed to **Andrew P. Zinner**, the attorney for the appellant, at **Nielsen, Broman & Koch, PLLC**, 1908 East Madison, Seattle, WA 98122, containing a copy of the **Brief of Respondent** in **STATE v. TOMMY D. HOLLINS**, Cause No. **67257-6-I**, in the Court of Appeals for the State of Washington, Division I.

I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.



Name
Done in Seattle, Washington

05/18/12

Date